Zeta Consumer Products Corporation *and* Chicago and Central States Regional Joint Board, UNITE. Case 33-CA-12633

August 24, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge filed on April 29, 1998, the Acting General Counsel of the National Labor Relations Board issued a complaint on June 5, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to provide information following the Union's certification in Case 33-RC-4152. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On July 16, 1998, the Acting General Counsel filed a Motion for Summary Judgment. On July 17, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 31, 1998, the Respondent filed a response, and on August 10, 1998, the Acting General Counsel filed a reply thereto.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding. In addition, the Respondent denies that the information requested by the Union is necessary and relevant.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that no issue warranting a hearing is raised with respect to the Union's information requests. By letter dated June 24, 1997, the Union requested the following information from the Respondent:

> A current list of all bargaining unit employees with names, addresses, job classifications, dates of employment and wage rates and a list of all current benefits and other conditions of employment applicable to bargaining unit employees.

Thereafter, by letter dated October 1, 1997, the Union requested the following additional information from the Respondent:

> - Copies of all write ups and records of employee contact for all employees for the last three years;
> - Attendance records of all current employees for the last three years;
> - Records of all drug tests and/or alcohol tests for the last three years; and
> - A copy of the OSHA 200 log for the last three years.

Finally, by letter dated May 12, 1998, the Union requested the following additional information from the Respondent:

> - A copy of all test results relating to safety (air quality, noise level, etc.) conducted over the last three years; and
> - A copy of any hazardous chemical plans, lockout/tagout, hazard communications, personal protective equipment, emergency and disaster preparedness, bloodbourne pathogens, and confined spaces currently in place.[1]

We find that the foregoing information is presumptively relevant to the Union's duties as the exclusive bargaining representative of the unit. See, e.g., *Super K-Mart*, 322 NLRB 583 (1996) (various employee and employment information and disciplinary actions); *Maple View Manor*, 320 NLRB 1149 (1996) (various employee and employment information, disciplinary actions, and drug/alcohol policies and procedures); *Hobelmann Port Services*, 317 NLRB 279 (1995) (disciplinary actions); and *Honda of Hayward*, 314 NLRB 443 (1994) (OSHA 200 logs and other health and safety information).[2]

[1] The Union also again specifically requested the OSHA 200 logs.

[2] As indicated above, the Union here seeks records of the actual drug/alcohol tests, not the Company's general policies and procedures regarding drug/alcohol testing. The Board has held that drug/alcohol testing of current employees is a mandatory subject of bargaining. See *Johnson-Bateman Co*., 295 NLRB 180 (1989). Cf. *Star Tribune*, 295 NLRB 543 (1989) (reaching opposite conclusion with respect to preemployment testing of applicants). Thus, information relating to testing of current employees is presumptively relevant. See generally *Hofstra University*, 324 NLRB 557 (1997) (citing *Washington Hospital Center*, 270 NLRB 396, 400-401 (1984)). The specific type of information requested here may, of course, implicate privacy or confidentiality concerns. See *Star Tribune*, supra. However, the burden is on the Respondent to raise any such privacy or confidentiality claim in a timely manner and to seek an accommodation with the Union. See *Exxon Co. USA*, 321 NLRB 896, 898 (1996), and cases cited therein. Here, the Respondent has not specifically asserted such a claim in response to the Union's request or the Acting General Counsel's complaint. Nor does it assert that it has sought an accommodation. Indeed, as indicated, it refused to recognize or bargain with the Union, and refused to provide any information to the Union, in order to test the Union's certification. Accordingly, we shall order the Respondent to provide the requested drug/alcohol testing information to the Union along with the other

Finally, in its response to the Notice to Show Cause, the Respondent asserts that the parties have initiated bargaining and the Respondent is in the process of responding to the Union's requests for information, and that the Motion for Summary Judgment is therefore moot. However, the charge has not been withdrawn, the Respondent has not amended its answer, and the allegations that the Respondent has refused to bargain and furnish information stand admitted. It is undisputed that the Respondent had refused to bargain at least as late as June 19, 1998, when it filed its answer to the complaint—after the Union had made its bargaining demand and nearly 3 months after the Union had been certified. That is a violation of Section 8(a)(5) and (1) of the Act, whatever may have happened afterwards. In these circumstances, we find, contrary to the Respondent, that the matter is not moot and that summary judgment is appropriate. See *Robinson Bus Service*, 324 NLRB 296 (1997).

Accordingly, we grant the Motion for Summary Judgment and shall order the Respondent to recognize and bargain with the Union and to furnish the Union the information requested.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey corporation, with an office and place of business in Macomb, Illinois, has been engaged in the business of manufacturing plastic bags and kitchen utensils. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations described above sold and shipped from its Macomb, Illinois facility goods valued in excess of $50,000 directly to points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held May 15, 1997, the Union was certified on March 26, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Macomb, Illinois facility; but excluding office clerical employees, professional employees, salespersons, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since March 26, 1998, the Union has requested the Respondent to bargain and to furnish information, and, since that date, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 26, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Zeta Consumer Products Corporation, Macomb, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Chicago and Central States Regional Joint Board, UNITE as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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information requested. In view of the Respondent's general refusal to bargain in order to test the certification, however, we do not preclude the Respondent from raising any privacy or confidentiality concerns in a timely manner and seeking an accommodation with the Union with respect to those concerns in the event our bargaining order is enforced by the court of appeals. Any issues that thereafter arise with respect to compliance with our order can be addressed in a compliance proceeding.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Macomb, Illinois facility; but excluding office clerical employees, professional employees, salespersons, guards and supervisors as defined in the Act.

(b) Furnish the Union the information that it requested on June 24 and October 1, 1997, and May 12, 1998.

(c) Within 14 days after service by the Region, post at its facility in Macomb, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 33 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Chicago and Central States Regional Joint Board, UNITE as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees employed by us at our Macomb, Illinois facility; but excluding office clerical employees, professional employees, salespersons, guards and supervisors as defined in the Act.

WE WILL furnish the Union the information it requested on June 24 and October 1, 1997, and May 12, 1998.

ZETA CONSUMER PRODUCTS CORPORATION